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MARK ZUCKERBERG

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CHILDREN'S HEALTH DEFENSE,

Plaintiff,

v.

FACEBOOK, INC., ET AL.,

Defendants.

Case No. 3:20-cv-05787-SI

**DEFENDANTS FACEBOOK INC.'S
AND MARK ZUCKERBERG'S
OPPOSITION TO PLAINTIFF'S
REQUEST FOR JUDICIAL NOTICE
(DKT. NO. 97) AND REQUEST FOR
LEAVE TO FILE STATEMENT OF
RECENT DECISION (DKT. NO. 98)**

Hon. Susan Illston

1 Almost one week after the Court took the pending motions to dismiss under submission,
 2 Children’s Health Defense (“CHD”) makes two unauthorized submissions to the Court: a request
 3 for judicial notice (Dkt. No. 97) and a motion for leave to file a statement of recent decision (Dkt.
 4 No. 98). CHD’s submissions are but the latest in a string of shifting allegations and dilatory tactics
 5 intended to avoid or delay adjudication of the fatal defects in CHD’s case. Both submissions should
 6 be rejected for what they are: thinly disguised efforts to improperly supplement CHD’s argument
 7 after briefing is closed and the Court has already heard extended argument on the pending motions.

8 **I. CHD’s Request for Judicial Notice Should Be Denied**

9 *First*, although CHD’s submission is styled as a request for judicial notice, in substance it
 10 represents CHD’s *fifth* attempt to supplement or modify its allegations; this latest effort is especially
 11 brazen given that a too-late motion to supplement is already pending.¹ In all events, the submission
 12 does not seek judicial notice of any material that would properly be noticeable by the Court at this
 13 stage. Instead, it represents an obvious effort to offer unauthorized supplemental argument in
 14 support of CHD’s theory of government coercion—a theory that was fully ventilated at the May 5,
 15 2021 hearing. This “ill-disguised attempt to recast” CHD’s claims and make additional
 16 unauthorized legal argument is not “a proper subject for judicial notice,” *Von Staich v. Valenzuela*,
 17 2017 WL 10636887, at *20 (C.D. Cal. Aug. 30, 2017), and must be denied.

18 *Second*, virtually all the purported facts to be noticed were available to CHD well in advance
 19 of the May 5, 2021 hearing. Most of the events or statements CHD identifies occurred before CHD’s
 20 latest attempt to supplement its allegations in March of 2021; indeed, many of the “new” purported
 21 facts occurred before the original complaint in this case was even filed in August of 2020. Now,
 22 nearly a week after a hearing on Defendants’ motion to dismiss, and after no fewer than four rounds
 23 of pleading, CHD once again attempts to inject yet more allegations into this case. This is, at best,
 24 confirmation of undue delay on the part of CHD. But given CHD’s strategy of belatedly amending
 25

26 ¹ As Defendants explained in the context of that motion, *see* Dkt. No. 82, the pattern and timing of
 27 CHD’s serial supplements and motions is troubling to say the least. CHD’s latest submissions only
 28 exacerbate the concern that CHD is unjustifiably prolonging and multiplying these proceedings,
 thereby imposing unreasonable burden and expense not only on Defendants but also on the Court.

1 or “supplementing” its pleadings throughout this action, CHD’s latest submission is better
 2 understood as further evidence of CHD’s bad faith efforts to continually move the target on its
 3 pleadings to avoid resolution of Defendants’ motion to dismiss.

4 **Third**, the statements and events CHD identifies are not material in any case. CHD’s new-
 5 found reliance on *Hammerhead Enterprises, Inc. v. Brezenoff*, 707 F.2d 33 (2d Cir. 1983),² is
 6 misplaced because, as Defendants have argued (Mot. 8-10), CHD’s joint-action allegations fail to
 7 establish any federal involvement in the *specific conduct* alleged to have violated CHD’s rights.
 8 None of the newly identified statements—or anything in CHD’s pleadings or proposed
 9 supplement—affect that conclusion. If anything, CHD’s belated filing confirms why dismissal with
 10 prejudice is warranted here. In *Hammerhead*, the Second Circuit explained that a First Amendment
 11 claim could not be stated because the government actor in question did not “have the power to
 12 impose sanctions” on private actors. *Hammerhead*, 707 F.2d at 39. The same is true here, as a few
 13 individual lawmakers do not have the power to change the law. And, notably, although it found it
 14 need not address them because it found no First Amendment violation, the Second Circuit
 15 recognized precisely “the competing First Amendment considerations of [the defendant’s] own right
 16 to speak” that Defendants have raised here and that independently foreclose CHD’s claims. *See id.*
 17 n.6.

18 **II. CHD’s Request For Leave To File A Statement of Recent Decision Should Be Denied**

19 CHD’s request for leave to file a statement of recent decision should be denied because it is
 20 procedurally improper and substantively irrelevant. Civil Local Rule 7-3(d)(2) states that counsel
 21 may bring supplemental authority to the Court’s attention “[b]efore the noticed hearing date” and
 22 only if it does so “without argument.” CHD’s submission fails on both counts. In any event, as the
 23 Court knows well, the cited authority involves compassionate release, and is irrelevant to any of the
 24 legal issues or factual allegations before the Court.

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 27
 28 ² CHD raised *Hammerhead* for the first time at argument but it was not briefed by the parties.

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2 Dated: May 12, 2021

WILMER CUTLER PICKERING, HALE AND
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3 By: /s/ Sonal N. Mehta
4 SONAL N. MEHTA

5 *Attorney for Defendants*
Facebook, Inc. and Mark Zuckerberg
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CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2021, I electronically filed the above document with the Clerk of the Court using CM/ECF which will send electronic notification of such filing to all registered counsel.

Dated: May 12, 2021

By: /s/ Sonal N. Mehta
Sonal N. Mehta